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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1950

No. 469

JOHN HOWARD MELISH, WILLIAM HOWARD MELISH, LEWIS REYNOLDS, ANNA MAY MASON and all other persons similarly situated or whom the same may represent,

Petitioners,

against

THE RECTOR, CHURCH WARDENS and VESTRYMEN of the CHURCH OF THE HOLY TRINITY IN THE CITY OF BROOKLYN, a religious corporation; LEONARD HULL SMITH and RANDALL O. WALKER, individually and as Wardens of said Church; JOSEPH DANA ALLEN, HAUGHTON BELL, BRUCE BROMLEY, MERRILL N. FOOTE, WALDO W. SELLEW, H. EDWARD VOLLMERS and BURTON H. WHITE, individually and as Vestrymen of said Church, and JAMES PERNETTE DE WOLFE as Bishop of the Diocese of Long Island,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

Supreme Court of the United States

October Term, 1950

No.

John Howard Melish, William Howard Melish, Lewis Reynolds, Anna May Mason and all other persons similarly situated or whom the same may represent,

Petitioners,

against

The Rector, Church Wardens and Vestrymen of the Church of the Holy Trinity in the City of Brooklyn, a religious corporation; Leonard Hull Smith and Randall C. Walker, individually and as Wardens of said Church; Joseph Dana Allen, Haughton Bell, Bruce Bromley, Merrill N. Foote, Walsh W. Shelley, H. Edward Vollmers and Burton H. White, individually and as Vestrymen of said Church, and James Pernette de Wolfe as Bishop of the Diocese of Long Island,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioners above-named pray that a writ of certiorari issue to review a decision of the Court of Appeals of the State of New York, the court of last resort of that state, rendered October 5, 1950, dismissing an appeal taken by petitioners to that Court from part of a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered April 6, 1950, affirming a judg-

ment of the Supreme Court in favor of respondents, entered in Kings County on April 26, 1960.

The part of the judgment as affirmed upon which review is sought in this Court enforces by declaratory and injunctive decree of the civil court, execution and compliance with the ecclesiastical judgment of respondent Bishop dissolving the pastoral relation between petitioner Archbishop Howard Melish as Rector and the Church of the Holy Trinity, Brooklyn, New York (R. 158-159).

Opinions Below

The Supreme Court of the State of New York rendered an opinion, which is reported in 194 Misc. 1000. The Appellate Division affirmed and denied reargument or leave to appeal, without opinion. 276 App. Div. 1099, 277 App. Div. 785. The Court of Appeals handed down a memorandum, which is reported in 301 N. Y. 679.

Question Presented

Whether the part of the judgment sought to be reviewed, by coercing execution and compliance with the ecclesiastical judgment of the Bishop on pain of contempt of court—in the teeth of an exclusive and different ecclesiastical remedy, namely, deprivation of diocesan representation until they submit thereto—constitutes an unwarranted intrusion of the civil power of the state in a religious controversy in violation of the constitutional separation of church and state guaranteed by the First Amendment of the United States Constitution and made applicable to the states by the Fourteenth Amendment thereof?

Statement of Matter Involved

Issue

In March 1950, the respondents (there then the Bishop as plaintiffs) commenced an action in the Supreme Court of the State of New York, Kings County, against the petitioners and the Bishop as defendants (R. 83). The relief sought in that action was the civil court's judgment enforcing, by declaratory and injunctive decree, among other matters, execution and compliance with the ecclesiastical judgment of the Bishop, dissolving the pastoral relation between petitioner John Howard Melish as Rector and the Church of the Holy Trinity, Brooklyn, New York (R. 90-93). The Bishop, though nominally a defendant in that action, by a cross-pleading joined in the prayer for that relief (R. 114).

After trial, the Supreme Court granted judgment in favor of respondents. The text of the part of the judgment which petitioners seek to review, is as follows (R. 188-189):

"1. It is hereby declared:

* * *

(c) That the pastoral relation between the Church of the Holy Trinity in the City of Brooklyn and the defendant John Howard Melish ensued and determined on April 4, 1949 and the defendant John Howard Melish legally ensued to be the Rector of said Church on April 4, 1949, and since that date has not been, and is not now legally authorized to exercise any of the ecclesiastical or temporal rights and duties of said office.

2. The defendants other than the defendant James Pernette DeWolfe, individually and collectively and all persons whom they purport to represent and all others who may attempt to act in concert

with them are hereby permanently enjoined and restrained from:

(a) Interfering with, delaying or preventing the execution and full compliance with the judgment of the defendant James Pernette DeWolfe as Bishop of the Diocese of Long Island, that the pastoral relation between the defendant John Howard Melish and the Church of the Holy Trinity in the City of Brooklyn be dissolved on April 4, 1949.

3. The defendant John Howard Melish is hereby permanently enjoined and restrained from exercising control of the worship and the spiritual jurisdiction of the Church of the Holy Trinity in the City of Brooklyn, and from the use and control of the Church and Parish buildings with the appurtenances and furniture thereof."

The quoted text from the judgment follows the prayer of the complaint and the prayer of the cross-pleading interposed by the Bishop. In their answers, all petitioners pleaded as a defense the facts which form the basis of the question upon which review is sought (R. 68-69, 101-102). The defense is pleaded in substantially similar language; and that in the answer of Reynolds, etc., is, as follows: (R. 101-102):

> "31. Canon 27 of the Diocese of Long Island (See Paragraph 'Twentieth' hereof and Exhibit 1) provides the sole remedy for neglect or refusal on the part of the Congregation to comply with a judgment of the Bishop rendered thereunder and that such sole remedy is to deprive the Congregation of a representative to the diocesan convention until they submit.

44. The Congregation refuses to comply with the purported pulpitment of the defendant Bishop.

* * *

51. A civil Court, therefore, has no power to grant any other, further or different relief in the premises."

Parties

There has been a change in the alignment of the parties in this controversy since this action was commenced, in consequence of the two regular annual parish elections that intervened. The action was commenced by the church corporation and the former vestry as a body and nine former vestrymen as individuals against the rector, the assistant minister and the committee representing more than 70% of the congregation (R. 173-174, 301-302, 304).

On the second day of the trial, it was stipulated that at the regular annual meeting of the prior evening (April 18, 1949) a new vestry was elected and that the new vestry for itself and for the church corporation repudiated the action of the Bishop and took a position in support of the Rector (R. 476-477). The regular term of office of respondents Walker, Bromley, Vollmers and White as vestrymen had then expired and petitioner Reynolds was elected as church warden in place of respondent Walker and others favorable to the Rector were elected in place of the other three respondents (R. 444, 540; Defendant's Exh. R.). At the second regular annual meeting referred to, on April 10, 1950, the regular term of office of respondents Smith, Allen and Sellew as vestrymen had expired and they failed of reelection; again, others favorable to the Rector were elected to fill the vacancies (Brooklyn Daily Eagle, April 11, 1950; New York Times, April 11, 1950).

Thus, Holy Trinity Church as a corporation and its new vestry as a body and the Holy Trinity congregation

are all now in favor of the position of the Rector and the Assistant Minister and only a minority of two holdover vestrymen, aided by the Bishop, are opposed to it.

Background

The beloved rector of the Church of the Holy Trinity for 45 years was himself dismissed, because he refused to dismiss the assistant minister, who is his son (R. 28, 440). The controversy grew out of a difference of opinion between the rector and the former vestry concerning the so-called outside activities of the assistant minister (R. 28). These centered chiefly about the assistant minister's activities in the National Council of American-Soviet Friendship (R. 458-473), of which he was chairman until about a month before the trial (R. 459).

The National Council was incorporated under the laws of the State of New York as a result of a weekend meeting in 1943 of many people in different walks of life, including the Vice-President of the United States and other high officials of our government, who in the course of the war felt that better understanding would improve the alliance working for victory (R. 381). Ever since then, a number of important members of the Episcopal Church have been associated with the National Council and at the time of the trial an Episcopal Bishop was a member of its board of directors (R. 382).

The assistant minister's interest in that direction was awakened by his prior work in Russian War Relief, the Brooklyn Division of which was also served by Mr. Hunter L. Delatour, Col. Jackson A. Dykman and Edward A. Richards, all members of the standing committee of the Long Island Diocese of the Protestant Episcopal Church (R. 382-383). In the summer of 1946, Bishop DeWolfe of this Diocese telephoned the assistant minister and asked him to represent the Bishop at a meeting of Russian War Relief, which the assistant minister did (R. 383).

At every large public meeting of the National Council, an invitation was extended to some outstanding clergyman to give the invocation (R. 383). Bishop Ludlow of Newark gave the invocation at one public meeting (R. 383-384). The rector, at another (R. 384). As late as 1947, an invitation was extended to Bishop DeWolfe, respondent herein, to give the invocation at a large public meeting held for Russian War Relief (R. 384). The Bishop was unable to accept, but Assistant Bishop Larned accepted and gave that invocation (R. 384).

Then came a change in the official attitude. The National Council was put upon the Attorney General's list in November or December of 1947 and early in 1948 the assistant minister and others filed suit in the District of Columbia Federal Court to remove it from the list (R. 385-386, 391). Certiorari was granted at the October Term, 1949, No. 554, to review the action of the Attorney General and the case at this writing is pending in the United States Supreme Court (National Council of American-Soviet Friendship, et al., v. J. Howard McGrath, Attorney General, et al.). The reason why the assistant minister continued his work with the National Council was thus stated by him (R. 380):

> "Because I believe that world peace depends upon the relationship between our own country and the Soviet Union, at this point, and anything constructive which a Christian clergyman can do in that area I believe is his conscientious duty to attempt to do."

It was not disputed that, when the former vestry finally demanded that the rector dismiss the assistant minister, the rector spoke with every one of them, as follows (R. 465):

> "Do you believe in this man's integrity? Yes. Do you believe in his sincerity? Yes.

> Do you believe in his earnestness? Yes.
>
> Do you believe in his devotion to the cause of Christ? Yes.
>
> Now, what more do you want of a Minister than those things?"

Moreover, the Bishop admitted that there was no "doctrinal" question or question of "heresy" involved nor any question of "immorality" (R. 334) nor even a question of "conduct unbecoming a clergyman" (R. 334), and added (R. 334):

> "I have every confidence in the moral integrity of these men."

Nevertheless, based upon the rector's refusal to discharge the assistant minister, the nine former vestrymen filed a petition on January 21, 1949, with the Bishop, praying for a dismissal of the rector (R. 23-25).

Before the petition was filed with the Bishop and at a meeting of the vestry on January 17, 1949, the rector was asked to resign (R. 23). That same evening, 73 members of the congregation sent the following telegram to the Bishop (R. 173-174); Defendant's Exhibit F):

> "We are shocked at the action of the vestry in asking for the resignation of our beloved Rector and assure you that in so acting they in no wise represent the sentiment of Holy Trinity Parish. We have met on short notice to plan action to canvass the parish on this issue and shall do all in our power to negate the vestry's action. We beg of you to exert all your influence to avert the consequences before they adversely affect the welfare of our Parish, Diocese and Church. We have elected representatives to discuss the issue with you and request that you meet them without delay."

Still before the receipt of the petition by the Bishop, the telegram was followed by a telephone call from one of the signatory members of the congregation, asking the Bishop to give a committee of the congregation an audience (R. 352). The Bishop refused, as he stated it, "Simply because it was my judgment that it was no time to see him" (one of the Committee) (R. 353), although the Bishop admitted that he twice saw a committee of the vestry (R. 354).

Thus, although notified that the action of the vestry in no way represented the sentiment of Holy Trinity Parish and after refusing to give audience to a committee of the congregation, the Bishop later received the petition of January 21, 1949, and on January 24, 1949, referred it to the standing committee of the Diocese of Long Island for advice (R. 26). And the standing committee called a hearing for February 15, 1949, upon notice to the clerk of the vestry and to defendant Reynolds as chairman of the Committee to Retain Our Rector (R. 26).

The Bishop admitted, however, that before the standing committee held the scheduled hearing and upon its advice, he had asked the rector to resign (R. 306-307).

It was agreed that the hearing by the standing committee was held under Canon 27 of the Long Island Diocese (R. 356). The full text of this Canon is set forth below.

The rector's counsel produced evidence before the standing committee that over 70% of the duly qualified voting members of the parish (R. 304) signed statements reading, as follows (R. 176, 535; Defendant's Exhibit H, p. 123):

> "We, the undersigned members of Holy Trinity Parish, are completely opposed to the action of the Vestry in asking the resignation of our Rector, Dr. John Howard Melish.

> We have the utmost affection for Dr. Melish and approve the policy he consistently followed for the 45 years of his rectorship. We state that the Vestry in this action in no way represents our sentiments."

Refusal to accept episcopal judgment

Having been repulsed and disregarded by the Bishop, the congregation refuse to accept his judgment. It was conceded at the trial that the new vestry and more than 70% of the duly qualified voting members of the congregation refuse to accept the arbitral judgment of the Bishop, ousting the rector (R. 301, 302, 304, 476). The same is true of the rector also (R. 18).

The Canon Involved

The Canon to which the defenses refer is as follows (R. 71-73):

> "Canon 27
>
> Of the Dissolution of the
> Pastoral Relations
>
> *Rector not to resign without consent of Vestry or be removed against his will.*
>
> Section I. A Rector may not resign his Parish, without the consent of the said Parish, or its Vestry, or its Trustees, whichever may be authorized to act in the premises, nor may any Rector or Minister canonically or lawfully elected and in charge of any Parish be removed therefrom by said Parish, Vestry or Trustees, against his will, except as hereinafter provided.

Ecclesiastical Authority to approve support or payments.

Sec. II. If for any reason a Rector or Minister as aforesaid, or the Parish committed to his charge, or its Vestry or Trustees, shall desire a separation and dissolution of the pastoral relation the parties may agree respecting such separation and dissolution and the terms thereof, provided, however, that an agreement imposing upon such Parish or its Vestry or Trustees any obligation to support or contribute to the support of such Rector or Minister or to pay him any sum or sums of money shall not become effective unless and until the Ecclesiastical Authority, acting by and with the advice and consent of the Standing Committee, shall approve the terms and conditions thereof and such consent and approval shall have been indorsed on or annexed to such agreement and such agreement, with such consent and approval filed with the Secretary of the Standing Committee.

Mode of Settling Differences.

Sec. III. If for any urgent reason a Rector or Minister as aforesaid, or the Parish committed to his charge, its Vestry or Trustees, shall desire a separation and dissolution of the pastoral relation, and the parties be not agreed respecting such separation and dissolution, notice in writing may be given by either party to the Ecclesiastical Authority. The Bishop, in case the difference be not settled by his godly judgment, or if he decline to consider the case without counsel, may ask the advice and consent of the Standing Committee, and, proceeding with its aid and counsel, shall be the ultimate arbiter and judge. If there be no Bishop, the Ecclesiastical Authority shall select a Bishop of an adjacent Dio-

cese to act as the Bishop, and with like force and effect. The judgment shall be either that the pastoral relation between the parties shall cease and determine at a time and upon terms therein specified, or that the said relation shall not be terminated; and it shall be the duty of both parties to submit and abide by such judgment.

Dissolution of the relationship.

Sec. IV. (1) If the final judgment be a recommendation that the pastoral relation be dissolved and that titles be relinquished by the Clergyman and he shall refuse to comply with the same within 30 days after the decision has been made known to him, the Bishop may declare the canonical dissolution of all connection between the parties.

Penalty for failure to comply.

(2) *And if the Vestry or Congregation refuse or neglect to comply on their part with such decision or judgment, the Church or Congregation shall be prohibited from a representation in Diocesan Convention until they submit thereto.*

Dissolution to be recorded.

Sec. V. In case of the regular and canonical dissolution of the connection between a Rector or Minister and his Parish, under this Canon, the Ecclesiastical Authority shall direct the Secretary of Convention to record the same."

(Emphasis in (2) supplied.)

Statement as to Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1257(3). The decision of the New York State Court of Appeals was rendered on October 5, 1950 (R. 591).

In the trial court, it has been seen, the facts which form the basis of the question upon which review is sought in this court were pleaded by petitioners as a defense (R. 68-69, 101-102). In its opinion, the trial court reviewed the Constitution and cases on the doctrine of the separation of church and state, but, nevertheless, concluded that respondents were entitled to the injunction sought.

Thus, the trial court quoted from *Watson* v. *Jones,* 80 U. S. at p. 730, the following (R. 496):

> "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority."

Then the court added its own observation on this subject, as follows (R. 496):

> "If ever we depart from this it will be a sorry day for America, for then the basic principle of the separation of church and state will be at an end.
>
> The founders of our Republic recognized this when into our Constitution they wrote those sixteen pregnant words: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'. (U. S. Const., 1st Amendt.) This must forever remain one of the foundation stones of our Nation. When that stone crumbles, the Nation will crumble with it."

Yet, the trial court concluded, as follows (R. 499):

> "The plaintiffs had a perfect right to resort to a court of equity to restrain injury to themselves or to protect the property of the church, for this involved a civil right."

It will be shown under the discussion of the reasons for granting this petition, that, even to the incidental extent that church property was involved, the court was bound to heed the exclusive esslesiastical remedy, for church property must be administered by command of statute "in accordance with the discipline, rules and usages" of the church (New York Religious Corporation Law, Section 5).

In the brief of petitioners Reynolds and Mason on the appeal to the Appellate Division, under Point II, reading (R. 577):

> "The judgment of the Court below was unauthorized, because the Canons themselves provide the exclusive ecclesiastical remedy for their enforcement, namely, deprivation of Diocesan representation until the parties submit",

there appears the following (R. 577-578):

> "Since under the Canons, the sole and exclusive remedy for enforcement of the Bishop's arbitral judgment is a prohibition of representation in Diocesan Convention until 'they submit thereto', the Court below had no authority to grant the injunction appealed from coercing compliance on pain of imprisonment for contempt. For that not only ignores the contract made by the parties, but also constitutes the rankest sort of interference by a civil court with church affairs.
>
> By a strange anomaly, all this was done on the basis of a 'deep and sincere' conviction that consti-

> tutional restraint 'has secured religious liberty from the invasion of the civil authority' (fols. 1486-87). A grosser invasion of religious liberty is difficult to imagine."

Since the Appellate Division affirmed, without opinion, 276 App. Div. 1088, there is no way of telling upon what basis that court disposed of the defense.

Thereafter, petitioners Melish moved in the Appellate Division for reargument or leave to appeal to the Court of Appeals and petitioners Reynolds and Mason moved for leave to appeal. In their affidavit, petitioners Reynolds and Mason pointed out to that court (R. 578):

> "Finally, a decree of a civil Court, coercing compliance on pain of contempt with an arbitral judgment of a Bishop in the teeth of an exclusive and different ecclesiastical remedy, is unauthorized as in violation of the terms and intent of the freedom of religion guaranteed by the New York State and Federal Constitutions."

These motions, too, were denied without opinion (277 App. Div. 783).

Thereupon, petitioners appealed to the Court of Appeals and by their notice of appeal stated, in pertinent part, as follows (R. 550):

> "Please Take Further Notice that said defendants appeal from that part of said judgment as affirmed which, by declarative and injunctive relief, approves and enforces the arbitral judgment of defendant Bishop dissolving the pastoral relation between the Rector and the Church of the Holy Trinity.
>
> Please Take Further Notice that this appeal is taken as of right on the ground that there is directly involved the construction of the Constitution of the

> State of New York, Article I Section 3, and the Constitution of the United States, First and Fourteenth Amendments, in that, the part of the judgment appealed from, by coercing compliance with the arbitral judgment of the Bishop on pain of contempt of court in the teeth of an exclusive and different ecclesiastical remedy, namely, deprivation of diocesan representation until they submit thereto, constitutes an unwarranted intrusion of the civil power in a church controversy contrary to the freedom of religion guaranteed by said Constitutions."

Under New York practice, this appeal to the Court of Appeals lies only as of right and is limited to the Constitutional question (New York State Constitution, Article VI, Section 7; New York Civil Practice Act, Section 588, Subdivision 1).

In the Court of Appeals, respondents moved to dismiss the appeal on two grounds: (1) that no constitutional question was involved and (2) that none was raised in the lower courts (R. 581-582). The Court of Appeals did not say that a constitutional question was not involved; nor did it say that it was not raised in the lower courts. That court dismissed the appeal upon the ground that no constitutional question was "properly" raised in the courts below. The full text of the Court of Appeals memorandum is, as follows (R. 591; 301 N. Y. 679 at p. 680):

> "Motions granted and appeal dismissed, with costs and $10 costs of motions, upon the ground that no constitutional question was properly raised in the courts below. (See *Matter of O'Neill* v. *Board of Regents,* 298 N. Y. 777; *Jongebloed* v. *Erie R. R. Co.,* 296 N. Y. 912; *City of New Rochelle* v. *Closter,* 296 N. Y. 506.)"

Whether the question was "properly" raised is a matter for this Court to decide. For, "the question whether a right or privilege, claimed under the Constitution or Laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a Federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the state. *Neal* v. *Delaware,* 103 U. S. 370, 396, 397; *Mitchell* v. *Clark,* 110 633, 645; *Boyd* v. *Nebraska ex rel. Thayer,* 143 U. S. 135, 180." *Carter* v. *Texas,* 177 U. S. 442, at p. 447.

And the applicable rules for determining such a question are set forth in this Court's opinions, as follows: It is not necessary to "refer to the precise words or particular section of the Constitution." *Oxley Stave Co.* v. *Butler County, Mo.,* 166 U. S. 648, at p. 657. "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, at p. 67. Then, "if the decision of the court, while not noticing the question, was such that the judgment was, by its necessary effect, a denial of the right claimed or referred to, it would be sufficient." *Dewey* v. *Des Moines,* 173 U. S. 193, at p. 199. "It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights." Mr. Justice Holmes in *Rogers* v. *Alabama,* 192 U. S. 226, at p. 230.

The cases cited in the memorandum of the Court of Appeals shed no additional light on the reason for the dismissal. All three are short memoranda, without any indi-

cation of the particular circumstances involved. The *O'Neill* case (298 N. Y. 777) and the *New Rochelle* case (296 N. Y. 506) merely state that the appeals are dismissed upon the ground that no constitutional question was properly raised below. The *Jongebloed* case says that (296 N. Y. 912):

> "While no constitutional question was urged at the trial term, it is sufficient for our jurisdictional purposes that, as here, a substantial constitutional question was properly presented to the Appellate Division and was necessarily involved in its decision."

The presentation of the question to the state courts was well within the rules laid down by this Court for purposes of a review on certiorari. It was before the trial court and it was before the Appellate Division and the Court of Appeals by chapter and verse.

Reasons for Granting the Writ

The writ should be granted because (1) the case presents an important constitutional question not heretofore decided by this Court and (2) the decision below is in conflict with applicable principles laid down in decisions of this Court.

(1) Important constitutional question not heretofore decided

Anson Phelps Stokes, D.D., LL.D., former secretary of Yale University and former Canon of Washington Cathedral, in his three volume work, Church and State in the United States (Harper, 1950), says that the pending Melish case (Vol. III, p. 402) "will be one of the most important cases in recent years involving Church-State relations." The Churchman, the oldest religious journal in the United

States, recently said editorially (November 15, 1950, at p. 5):

> "The Canon Law of the Protestant Episcopal Church sets a specific and comparatively mild penalty for a congregation that refuses to obey an episcopal judgment dissolving a pastoral relationship, namely, deprivation of representation in the diocesan convention. The reason for the mildness of this penalty lies in the respect which the Episcopal Church traditionally pays to the rights and relative importance of the congregation.
>
> In the 'Melish Case,' a lower court judge, oblivious to the long struggle for democracy in church affairs that underlies our Canon Law, substituted for this mild penalty a drastic civil court injunction enforcing the congregation's compliance with the bishop's judgment upon pain of fine or imprisonment for contempt of court. The judge brushed aside the provisions of our Canon Law and substituted a penalty of his own choosing.
>
> Was not this a clear intrusion of the civil court into the realm of Canon Law in violation of the State and Federal Constitutions, both of which establish absolute separation of church and state?
>
> If this precedent is permitted to stand unchallenged, what of the future?"

The question presented has not heretofore been decided by this Court. Counsel's research has failed to discover that it has heretofore been decided by any court.

Indeed, so plain and palpable an intrusion of the civil power in a religious controversy in the teeth of an exclusive church canon could be understood only as a product of the current political tensions. And yet, this Court has many times said that the integrity of the constitutional guarantees is best exhibited under stress. A noble re-

statement of that principle may be found in the opinion of the United States Court of Appeals for the Ninth Circuit, when it granted Harry Bridges bail (New York Times, August 25, 1950, p. 4, col. 6):

> "that however hard and disagreeable may be the task in times of popular passion and excitement, it is the duty of the courts to set their faces like flint against this erosive subversion of the judicial process."

(2) Decision below in conflict with applicable principles laid down by this Court

(a)

"The First Amendment, which the Fourteenth makes applicable to the states, declares that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'; * * *." *Murdock* v. *Penn.*, 319 U. S. 105, at p. 108; see, also, *Illinois* v. *Board of Education*, 330 U. S. 1; *Prince* v. *Mass.*, 321 U. S. 158; *Cantwell* v. *Conn.*, 310 U. S. 296. "Neither a state nor Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa" for "the First Amendment has erected a wall between Church and State, which must be kept high and impregnable." *Illinois* v. *Board of Education*, 333 U. S. 203, 210-211, 212.

The reach of the constitutional guarantee is not only to protect a state of mind in respect of religion, but also the "free exercise thereof". In *Cantwell* v. *Connecticut*, this Court defined the "double aspect" of the constitutional guarantee as "freedom to believe and freedom to act" (310 U. S. 296, at p. 303):

> "On the one hand, it forestalls compulsion by law of acceptance of any creed or the practice of any

> form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act."

In other words, the governance of a church as well as its creed is within the constitutional guarantee. Thus, in deference to the constitutional separation of church and state, the State of New York disclaims the right to interfere with worship and provides that the "worship of any church" shall be governed "by the authority provided in the laws, regulations, practice, discipline, rules and usages" of the church (Religious Corporations Law, Section 26). Thus, also, the State disclaims any right to interfere in the "calling, settlement, dismissal or removal of a minister" and provides that these shall be governed by the "laws and regulations, practice, discipline, rules and usages" of the church (Id., Section 25). And, finally, the State provides that the temporalities and property of any church shall be administered "in accordance with the discipline, rules and usages" of the church (Id., Section 5).

And the constitutional prohibition against state action applies equally to a decree of a state court taken pursuant to its common law as to action by any other organ of a state. *Shelley* v. *Kraemer*, 334 U. S. 1. For by such decree, a state makes available "the full coercive power of government" (Id., p. 19). In *Shelley* v. *Kraemer*, this Court wrote (334 U. S. at p. 20):

> "We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common law policy."

One of the previous decisions was noted in that opinion, as follows (pp. 17-18):

> "In *Cantwell* v. *Connecticut,* 310 U. S. 296, a conviction in a state court of the common-law crime of breach of the peace was, under the circumstances of the case, found to be a violation of the Amendment's commands relating to freedom of religion."

(b)

A review of the "background and environment of the period in which that constitutional language was fashioned and adopted", shows that, among other things, in "efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed". *Everson* v. *Board of Education,* 330 U. S. 1, at p. 9.

From the foregoing, it is apparent that the injunctive provisions of the judgment herein reenact one of the specific evils against which the constitutional guarantee was adopted. The members organized the Protestant Episcopal Church and adopted canons to govern the "free exercise" of their religious beliefs. Among these is one which provides for the sole and exclusive ecclesiastical sanction for refusal and neglect to comply with an ecclesiastical judgment severing the pastoral relation, namely, deprivation of diocesan representation "until they submit thereto". In these circumstances, the civil court had no power to grant an injunction compelling compliance with the Bishop's judgment on pain of fine and imprisonment for contempt. For the constitution forbids state action by a civil court to use the "coercive power of government" (*Shelley* v. *Kraemer,* 334 U. S. at p. 19) to "participate in the affairs of any religious organizations or groups" (*Illinois* v. *Board of Education,* 333 U. S. at p. 211). By the injunction herein

granted, the Court has effected a breach in "the wall between Church and State" erected by the constitution (Id., p. 212).

(c)

Nor may the injunction be justified on the theory that the civil court intervened to protect a property right or, as the trial court put it (R. 499), "to protect the property of the church, for this involved a civil right." Even to the incidental extent that church property was involved, the Court was bound to heed the exclusive ecclesiastical remedy. For, as has been seen, Section 5 of the Religious Corporation Law provides, in deference to the constitutional separation of church and state, that all property of the church corporation shall be administered "in accordance with the discipline, rules and usages" of the church. And the discipline and rule to which this corporation's property was subject provides, it has been seen, that the sole and exclusive remedy at bar was an ecclesiastical remedy, namely, deprivation of Diocesan representation "until they submit thereto".

Neither was anything contrary involved or decided in *Fiske* v. *Beatty,* 120 Misc. Rep. 1, aff'd 206 App. Div. 349, aff'd 238 N. Y. 598, cited by respondents (R. 581). For in the *Fiske* case, the canon involved did not provide an exclusive or any sanction or penalty for failure to comply. In that case, the canon (General Canon 41) provided (fol. 367 of the *Fiske* record):

> "In the event of either party refusing to abide by such judgment, the penalty for such refusal and the further proceedings in the case shall be those provided by the Constitution and Canons of the Diocese or Missionary District in which such Parish is situated."

And the Court there found (fols. 368-369 of the *Fiske* record):

> "No provision has been made by the Constitution or Canons of the Diocese of Central New York upon the subject covered by said General Canon 41 nor any penalty provided for refusal to abide by the judgment authorized by said canon."

It was precisely because in the *Fiske* case the canon did not provide any ecclesiastical remedy that the Court there held that equity should supply one. Overruling a defense that a civil court could not enforce an ecclesiastical decision, the Special Term in that case wrote (120 Misc. Rep. at p. 18):

> "The answer to the first defense is the fact that there is no remedy within the law of the church."

And, finally, that opinion concludes the consideration of this point, as follows (120 Misc. Rep. at p. 20):

> "Not having done so, there is a remedy, and, inasmuch as the church provides no penalty therefor, there must be a resort to civil courts."

On the appeal to the Court of Appeals, the Bishop's brief in that case recognized that the state law disclaims any right to interfere between the parish and its clergy and justified the civil court's jurisdiction solely upon the ground that the church provided no remedy. The Bishop's brief in that case argued:

> "As to the relations of the Parish to its Clergy the State Law expressly and repeatedly disclaims the right to interfere.
>
> Rel. Corp. Law, Sec. 5, last clause; Sec. 25, Sec. 42, last clause and Sec. 43.

The Canons and the Law of the Church therefore control" (p. 68).

"Certainly the law of the church affords no remedy (See Canons General and Diocesan. Dr. White's testimony, pp. 486-489).

* * *

So that unless the remedy granted by the Special Term is sustained plaintiff has no remedy" (pp. 56-57).

In the case at bar, there is, however, an ecclesiastical remedy and an exclusive one "until they submit thereto". The Courts below, therefore, had no power to grant the injunction.

CONCLUSION

In the concurring opinion in *Illinois* v. *Board of Education*, Mr. Justice Frankfurter wrote (333 U. S. at p. 232):

> "If nowhere else, in the relation between Church and State, 'good fences make good neighbors'."

The writ of certiorari should be granted and the part of the judgment sought to be reviewed should be reversed.

Respectfully submitted,

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